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THE CAT'S PAW SUPERVISOR: *VANCE V. BALL STATE UNIVERSITY*'S FLEXIBLE JURISPRUDENCE

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ABSTRACT—It is easier to hold a company liable for workplace harassment perpetrated by a supervisor than by a coworker. In *Vance v. Ball State University*, the Supreme Court attempted to clarify the crucial yet enigmatic definition of "supervisor." In doing so, the Court created a definition that early commentators criticized as too narrow and too inflexible to capture the varied structures of the modern workplace. In contrast to those commentators, this Note argues that *Vance*'s definition is flexible enough to encompass all workplaces. *Vance*'s definition does this by incorporating the tort concept of proximate causation into employment law. As this Note argues, *Vance* should be read to hold that a supervisor is someone who can proximately cause an employer to take a tangible employment action against another employee.

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INTRODUCTION

Kimberly Ellerth was a salesperson for Burlington Industries in Chicago.[1] Ted Slowik was a vice president for one of Burlington's divisions based out of New York.[2] Slowik was not Ellerth's direct supervisor and could not make hiring and firing decisions without approval from his supervisor.[3] Over the course of about a year, Slowik made repeated unwelcome sexual advances toward Ellerth, including unwanted touching and suggesting that wearing revealing clothing would make her job "a whole heck of a lot easier."[4]

Ellerth sued Burlington Industries and played a key role in the development of how companies are held liable for harassment. Ellerth's case established that, under federal employment law, employers are liable for harassment by supervisors unless they prove an affirmative defense developed by the Court.[5] Employers are not similarly liable for harassment by coworkers—they are only liable for harassment by coworkers if the plaintiff proves that the employer was negligent in allowing the harassment to happen.[6] The Court held that Slowik was a supervisor and that

[1] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 747 (1998). Following the procedural posture of the case, the facts related here assume that Ellerth's allegations are true. *See id.*

[2] *Id.*

[3] *Id.*

[4] *Id.* at 748.

[5] *Id.* at 765. *Ellerth* was decided on the same day as a twin case in which the Supreme Court reiterated the same framework for employer liability for harassment that it announced in *Ellerth*. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[6] Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013).

Burlington Industries was liable unless it could establish the affirmative defense.[7]

Title VII of the Civil Rights Act of 1964 protects employees from discrimination because of their race, gender, religion, and national origin.[8] As a result of *Ellerth*, it is easier to hold an employer liable if the plaintiff's supervisor perpetrated the harassment than if a coworker was the harasser in a Title VII hostile work environment claim.[9] However, the term "supervisor" does not appear in Title VII,[10] and the definition of supervisor remained contested until 2013.

The Supreme Court clarified the definition of supervisor in its 2013 *Vance v. Ball State University* decision, holding that a person is a supervisor for purposes of Title VII liability "if he or she is empowered by the employer to take tangible employment actions against the victim."[11] *Vance* purported to establish a "clear distinction" between supervisor and coworker,[12] which could be "readily applied" by lower courts and litigants.[13] Early commentators largely embraced the *Vance* Court's characterization of its rule as clear, unambiguous, and easily administrable.[14]

Despite the Court's desire for a clear definition of supervisor, workplace hierarchy has become more complex and difficult to classify over the past thirty years.[15] Corporations have become flatter and broader, requiring ultimate decisionmakers to delegate more authority.[16] Like in *Ellerth*, decisions made by one supervisor may require approval from a

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[7] *Ellerth*, 524 U.S. at 766.

[8] 42 U.S.C. § 2000e-2 (2012).

[9] *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

[10] *Vance*, 133 S. Ct. at 2446.

[11] *Id.* at 2439.

[12] *Id.* at 2443.

[13] *Id.* at 2449.

[14] *See, e.g.*, Stephen M. Flanagan, *Supreme Court: Court Defines Who is "Supervisor" Under Title VII*, FLETCHER CORP. L. ADVISER, Aug. 2013, at 2; Allan H. Weitzman & Laura M. Fant, *The* Vance *Victory on the Definition of "Supervisor"—The "Back Story,"* HR ADVISOR: LEGAL & PRAC. GUIDANCE, Sept.–Oct. 2013, at 8. *But see* Jeffrey M. Hirsch, *The Supreme Court's 2012–2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMP. RTS. & EMP. POL'Y J. 157, 173 (2013) ("[T]he Court made another questionable assertion in claiming that its rule is clear and easy to apply.").

[15] Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 640–41 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001).

[16] Raghuram G. Rajan & Julie Wulf, *The Flattening Firm: Evidence from Panel Data on the Changing Nature of Corporate Hierarchies*, 88 REV. ECON. & STAT. 759, 760–61 (2006) [hereinafter *Flattening Firm*] (studying 300 publicly traded U.S. companies from 1986 to 1998); *see also* Julie Wulf, *The Flattened Firm—Not as Advertised*, CAL. MGMT. REV., Fall 2012, at 6–9 [hereinafter *Not as Advertised*] (finding similar results with a data set spanning 1986 to 2006).

higher-level manager.[17] Innovations like self-directed work teams[18] and multisource job evaluations[19] have muddied the lines of authority and influence in the workplace. Bright-line rules are ill suited to informal and nonhierarchical workplace dynamics.[20] Despite purporting to establish a bright-line rule, *Vance* explicitly acknowledged these changing workplace dynamics.[21]

In contrast to the initial conventional wisdom regarding *Vance*,[22] this Note argues that *Vance* adopted a flexible rule for determining who counts as a supervisor rather than a bright-line rule. The *Vance* Court noted that, in cases where a formal decisionmaker relies on the opinion of another employee, "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[23] This insight illuminates what *Vance* meant by "empowered by the employer to take tangible employment actions."[24] *Vance*'s "effectively delegated" language makes its definition of supervisor susceptible to different interpretations in different workplace dynamics of influence. The *Vance* rule's flexibility is its major advantage in addressing harassment in an increasingly complex and changing workplace.

This Note demonstrates that *Vance*'s "effectively delegated"[25] language ties its definition of supervisor to another Title VII doctrine regarding employer liability: cat's paw liability.[26] Thus, the key to

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[17] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 747 (1998).

[18] Seung-Bum Yang & Mary E. Guy, *Self-Managed Work Teams: Who Uses Them? What Makes Them Successful?*, 27 PUB. PERFORMANCE & MGMT. REV. 60, 61 (2004).

[19] Fred Luthans & Suzanne J. Peterson, *360-Degree Feedback with Systematic Coaching: Empirical Analysis Suggests a Winning Combination*, 42 HUM. RESOURCES MGMT. 243, 243–44 (2003).

[20] *See* Sturm, *supra* note 15, at 461.

[21] Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013) (noting that in "modern organizations that have abandoned a highly hierarchical management structure," day-to-day management functions may be shared among team members).

[22] *See supra* notes 12–14 and accompanying text.

[23] 133 S. Ct. at 2452.

[24] *Id.* at 2454.

[25] *Id.* at 2452 ("If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies." (citation omitted)).

[26] The term "cat's paw" refers to the classic fable in which a monkey convinces a cat to pull some chestnuts out of a fire for them both to eat, and the monkey subsequently eats all of the chestnuts leaving none for the badly burned cat. Tim Davis, *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 248 (2007) (explaining that in the Title VII context the nonbiased decisionmaker is the "cat's paw" doing the dirty work for the biased influencer).

understanding what *Vance* means by "empowered by the employer to take tangible employment actions" lies in the Supreme Court's jurisprudence recognizing cat's paw liability. In a cat's paw situation, an employee acting based on impermissible bias proximately causes a nonbiased decisionmaker to take a tangible employment action. The employer may be liable even though the actual decisionmaker is not acting because of bias—that an employee acting because of bias proximately caused the decision may be sufficient for liability.[27] Furthermore, the biased employee must have been acting within the scope of his employment or in a way that would make the employer liable under traditional agency principles when he proximately caused the tangible employment action to be taken.[28]

This Note argues that, in accord with cat's paw liability, *Vance* should be read to indicate that employees are supervisors if, while acting within the scope of their employment or in a way that would make the employer liable under traditional agency principles, they have the power to proximately cause a tangible employment action to be taken against another employee. Crucially, the scope-of-employment-or-similarly-liable limit prevents persons who truly are coworkers from being supervisors under this definition.

Part I of this Note explores the agency principles that underlie both cat's paw liability and employer vicarious liability for supervisory harassment. These agency principles are important guides to understanding the category of supervisor and how it fits into employer vicarious liability under Title VII. They are also important for understanding how cat's paw liability maps onto *Vance*'s definition of supervisor.

Part II of this Note demonstrates that *Vance*'s definition of supervisor incorporates the cat's paw liability concept. Part II then establishes the contours of the supervisor as someone who can proximately cause a tangible employment action. Part II also explores why defining supervisor through ability to proximately cause a tangible employment action is normatively desirable. This flexible definition of supervisor is better than a bright-line rule at protecting employees from hostile work environments in the modern, flexible workplace.

Finally, this Note explores how lower courts can administer the ability-to-proximately-cause standard. Courts are familiar with inquiring into hypothetical workplace power dynamics in other contexts, most notably the control test for determining if a worker is an employee or an

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[27] *See* Staub v. Proctor Hosp., 562 U.S. 411, 422–23 (2011).

[28] *See id.* at 422 n.4.

independent contractor.[29] In this context, courts have developed factor tests to enhance predictability and aid in administration. This Note proposes a factor test that courts could apply to implement the ability-to-proximately-cause standard.

I. BACKGROUND

This Part lays out the doctrinal background for the rest of the Note. First, it explains the hostile work environment cause of action. It then explores the contours of employer liability for a hostile work environment and the agency principles that inform it. Then it presents *Vance*'s definition of supervisor and explores its nuances. Finally, this Part lays out the contours of cat's paw liability as defined by the Supreme Court in *Staub v. Proctor Hospital*.[30]

A. The Hostile Work Environment Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against any worker "with respect to his compensation, terms, conditions, or privileges of employment" based on race, gender, religion, or national origin.[31] Most Title VII claims require that an employee demonstrate that the employer has changed the worker's "compensation, terms, conditions, or privileges of employment"[32] by taking a tangible employment action against the worker.[33] A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[34] Tangible employment actions usually involve economic harm to the employee.[35] A job reassignment absent a change in title, salary, or benefits does not count as a tangible employment action.[36]

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[29] *See infra* notes 190–93 and accompanying text.

[30] 562 U.S. 411.

[31] 42 U.S.C. § 2000e-2 (2012).

[32] *Id.*

[33] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the classic Title VII burden-shifting proof framework for an individual disparate treatment claim); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing an individual disparate impact cause of action under Title VII under which employers can be held liable for facially neutral employment policies that nevertheless discriminate impermissibly in their impact).

[34] Pa. State Police v. Suders, 542 U.S. 129, 144 (2004) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

[35] *Ellerth*, 524 U.S. at 762 ("A tangible employment action in most cases inflicts direct economic harm.").

[36] *Id.* at 761 (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (holding that there was no tangible employment action because the plaintiff was reassigned "but

In a hostile work environment claim, however, courts do not require a tangible employment action.[37] Congress intended Title VII "to strike at the entire spectrum of disparate treatment" in the workplace,[38] and thus Title VII protects much more than just workers' economic interest in continued employment, advancement, and fair pay.[39] The central insight behind a hostile work environment cause of action is that a hostile environment that is sufficiently severe or pervasive alters an employee's "compensation, terms, conditions, or privileges of employment."[40] Even without any tangible employment action, "the very fact that the discriminatory conduct [is] so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[41]

Absent a tangible employment action, however, an employer's culpability for actions in the workplace becomes less certain. A tangible employment action, like hiring or firing, is an official act of the employer, and thus an employer is strictly liable for such actions when motivated by impermissible discrimination.[42] An employer's vicarious liability for discrimination that does not involve an official act of the enterprise is less obvious.

B. Employer Vicarious Liability

The Supreme Court addressed the puzzle of employer vicarious liability in twin cases, *Burlington Industries, Inc. v. Ellerth*[43] and *Faragher v. City of Boca Raton*.[44] *Faragher* and *Ellerth* established that if a supervisor creates a hostile work environment and there has been no tangible employment action, the employer is liable unless it proves an

suffered no diminution in her title, salary, or benefits")). By extension, giving day-to-day on-the-job direction would not count as a tangible employment action.

[37] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

[38] *Id.*

[39] Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("[T]he phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with . . . discrimination.").

[40] 42 U.S.C. § 2000e-2 (2012); *Meritor*, 477 U.S. at 67.

[41] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[42] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

[43] *Id.*

[44] 524 U.S. 775 (1998). In *Faragher*, Beth Ann Faragher, a lifeguard for the City of Boca Raton, was subjected to lewd remarks, offensive touching, and comments that were threats of tangible employment action from Bill Terry, the City's Chief of Marine Safety, and David Silverman, his lieutenant. *Id.* at 780–81. Although Terry had the power to take tangible employment actions against Faragher subject to approval by higher management, Silverman's responsibilities only included day-to-day assignment of work and supervision of Faragher's work and fitness training. *Id.* at 781.

affirmative defense.[45] The affirmative defense has two prongs. The employer may escape liability by showing (1) that it "exercised reasonable care to prevent and correct" the hostile work environment and (2) that the employee unreasonably failed to avoid harm by taking advantage of the employer's offered preventative or corrective measures.[46] Although the Court did not specifically decide the question of liability for coworker harassment in *Ellerth* and *Faragher*, it did note in *Faragher* that lower courts had "uniformly" required proof of negligence to hold employers liable for harassment by coworkers,[47] and the Court has since confirmed this standard.[48] In arriving at this holding, the Court elucidated the agency principles and policy considerations that underlie employer liability for harassment under Title VII.[49]

1. Agency Principles.—Ellerth and *Faragher* looked to agency principles to establish employer liability for supervisor harassment. The Court has consistently held that Congress intended agency principles to guide an employer's vicarious liability under Title VII and sought guidance from the Restatement (Second) of Agency.[50] Agency principles dictate that an employer is liable for intentional or negligent torts committed by an employee acting within the scope of her employment.[51] However, the Court rejected this agency principle as a basis for employer liability for harassment because an employee acting within the scope of her employment must be acting, at least in part, with a purpose to serve the employer.[52] Thus, harassment is not within any employee's scope of employment because harassment is not motivated by intent to serve the employer.[53]

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[45] *Id.* at 807; *Ellerth*, 524 U.S. at 765.

[46] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[47] *Faragher*, 524 U.S. at 799.

[48] Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013).

[49] *Id.* at 2442 (referring to the *Faragher* and *Ellerth* framework as a "compromise" between agency principles and Title VII's goal of encouraging employers to prevent harassment). The Court also looked to policy goals to shape *Faragher* and *Ellerth*'s affirmative defense, specifically mentioning Title VII's goal of preventing discrimination, the goal of encouraging employers to adopt effective antiharassment policies, and the tort concept of a victim having the duty to mitigate and avoid damages. *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 764.

[50] *Faragher*, 524 U.S. at 791–92; *Ellerth*, 524 U.S. at 754–55 ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles."); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

[51] *Ellerth*, 524 U.S. at 755–56; *Faragher*, 524 U.S. at 793.

[52] *Ellerth*, 524 U.S. at 756; *Faragher*, 524 U.S. at 793.

[53] *Ellerth*, 524 U.S. at 757. *Faragher* acknowledges that the scope of employment analysis requires a policy judgment regarding whether the loss caused by the employee's action should be borne by the employer as a normal risk inherent to being in business. *Faragher*, 524 U.S. at 797. However, the Court concluded that Title VII harassment is not within the scope of a supervisor's employment. *Id.* at 798–99.

The Court instead looked elsewhere in the Restatement to justify employer liability for harassment, focusing on a provision stating that employers are liable for acts outside of an employee's scope of employment if the employee was "aided in accomplishing the tort by the existence of the agency relation."[54] However, a strictly literal reading of the aided-by-agency-relation standard has the potential to provide too much employer liability: any act of workplace harassment is aided by proximity in the workplace. Thus, a literal reading of this standard would result in strict liability for employers for both supervisor and coworker harassment.[55] Strict liability would contradict *Meritor Savings Bank v. Vinson*'s holding that employers should not be strictly liable for harassment[56] and the lower court consensus[57] that employers are only liable for coworker harassment if the employer was negligent.[58] Thus, the Court in *Ellerth* and *Faragher* and subsequent lower courts have looked for principled justifications for treating supervisor and coworker harassment differently under an aided-by-

First, the Court held that Congress intended to incorporate into Title VII the traditional agency distinction between performing one's job duties and actions outside of that, known as a "frolic." *Id.* Harassing someone seems like a frolic compared to, for example, firing someone. *Id.* Second, the Court concluded that harassment is outside of the scope of any employee's employment, noting that lower courts uniformly hold employers liable for coworker harassment only if the employer is negligent, even if the harassment was foreseeable in the course of business. *Id.* In contrast to harassment, one can envision a circumstance where a severely misguided and bigoted supervisor acts within the scope of his employment by discriminatorily firing someone in the ignorant belief that not having a woman or racial minority in that particular job would help the employer. *See Ellerth*, 524 U.S. at 757.

[54] *Ellerth*, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)); *Faragher*, 524 U.S. at 801 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)). Notably, the Restatement (Third) of Agency removed the aided-by-agency-relation standard in favor of expanding the theory of employer liability involving an employee who, although acting outside of the scope of her employment, cloaks herself in the "apparent authority" of the employer in committing the tort. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006); *see* Vance v. Ball State Univ., 133 S. Ct. 2434, 2441 n.2 (2013). Commentators have suggested that this clarification of agency principles destabilizes the *Faragher* and *Ellerth* framework because, absent at least a threat of a tangible employment action, the harassing supervisor is not operating under the employer's "apparent authority." *See, e.g.*, Paul T. Sorensen, *A Fresh Look at Employer Liability for Sexual Harassment*, 27 T.M. COOLEY L. REV. 509, 527 (2010). The Supreme Court has acknowledged this change in the Restatement but has not had occasion to change the *Faragher* and *Ellerth* framework due to it. *Vance*, 133 S. Ct. at 2441 n.2.

[55] *Ellerth*, 524 U.S. at 760 ("In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."); *Faragher*, 524 U.S. at 802 ("[T]here is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship.").

[56] 477 U.S. 57, 72 (1986) ("While [agency] principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.").

[57] *Faragher*, 524 U.S. at 799.

[58] *Ellerth*, 524 U.S. at 763–64 (noting that one dilemma involved in using the aided-by-agency-relation standard is that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference."); *Faragher*, 524 U.S. at 804.

agency-relation theory of employer liability for harassment.[59]

2. Power to Take Tangible Employment Actions.—The distinction between supervisor and coworker harassment under the aided-by-agency-relation standard may be that supervisors have the power to take tangible employment actions against their victim. The Supreme Court recognized in *Ellerth* that "[t]angible employment actions fall within the special province of the supervisor."[60] Lower courts have adopted this insight and held that the ability to take adverse employment actions is the "essence" of supervisory authority.[61] Heeding *Ellerth*'s warning that "[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself,"[62] courts have used this unique feature of supervisory authority to flesh out the application of the aided-by-agency-relation standard to employer vicarious liability under Title VII.[63] Ultimately, *Vance* supports the view that, under the aided-by-agency-relation standard, supervisors are those formally empowered to take tangible employment actions.[64]

3. Authority and Employee Vulnerability.—In both *Faragher* and *Ellerth*, the Supreme Court noted that a supervisor's inherent power in the workplace distinguishes him or her from a coworker for the purposes of the aided-by-agency-relation standard. The Court observed that "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor."[65] While a coworker is aided by proximity in the workplace, the harassing supervisor is aided further by the hierarchical nature of the relationship. The touchstone of this conception of employer liability is the

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[59] *See, e.g.*, *Ellerth*, 524 U.S. at 760 (recognizing that because "[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself," the Court must give it more definition); *Faragher*, 524 U.S. at 802 (referring to the aided-by-agency-relation standard as the "appropriate starting point" for unraveling employer vicarious liability for harassment).

[60] 524 U.S. at 762.

[61] *See, e.g.*, Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033–34 (7th Cir. 1998) (finding that "it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment," and that "because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor"); Noviello v. City of Boston, 398 F.3d 76, 95–96 (1st Cir. 2005).

[62] 524 U.S. at 760.

[63] *See, e.g.*, *Parkins*, 163 F.3d at 1033–34 (holding that to qualify as a supervisor and thus incur employer liability without a demonstration of employer negligence, a harasser must have had the power to take tangible employment actions against his victim).

[64] 133 S. Ct. 2434, 2439 (2013).

[65] *Faragher*, 524 U.S. at 803 (elaborating that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior"); *see also Ellerth*, 524 U.S. at 763 (noting that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character").

employee's vulnerability to supervisor conduct as judged by whether the employee feels free to remove herself from the situation or feels compelled to stay and "suffer the insufferable."[66]

Before *Vance*, many courts held that the power to take tangible employment actions was not necessary for supervisory authority.[67] A supervisor who, for example, directs work but may not hire or fire still has "special dominance" over other employees, and this dominance significantly enhances his ability to impose a hostile work environment on another employee.[68] After all, in recognizing a hostile work environment cause of action, the Supreme Court concluded that absent any tangible employment action, a supervisor could have such an effect on an employee that the supervisor's actions violate Title VII.[69] Despite *Vance*'s emphasis on ability to take tangible employment actions, the idea that employees are especially vulnerable to supervisors who are "clothed with the employer's authority"[70] remains relevant in explaining Title VII vicarious liability principles.[71]

C. Vance *Clarifies and Muddies the Waters*

Faragher and *Ellerth*'s affirmative defense makes the distinction between supervisor and coworker important for determining the burden of proof regarding employer vicarious liability. The Supreme Court attempted to define the term supervisor in *Vance v. Ball State University*.[72] Writing

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[66] Mikels v. City of Durham, 183 F.3d 323, 333–34 (4th Cir. 1999).

[67] *Ellerth*, for example, notes that there are circumstances in which "the supervisor's status makes little difference" to the course of the harassment. 524 U.S. at 763.

[68] Mack v. Otis Elevator Co., 326 F.3d 116, 125–26 (2d Cir. 2003); *see also* Whitten v. Fred's, Inc., 601 F.3d 231, 245 (4th Cir. 2010) (recognizing that "employees with only 'some measure of supervisory authority' could be aided by the agency relation, such that the imposition of vicarious liability would be appropriate"); Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (noting that supervisors in both *Ellerth* and *Faragher* for whose actions the Supreme Court held the employer vicariously liable did not have plenary power to take tangible employment actions and required sign-off from higher-ups to hire and fire).

[69] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

[70] *Ellerth*, 524 U.S. at 763 (quoting *Meritor*, 477 U.S. at 77 (Marshall, J., concurring)).

[71] Indeed, by replacing the aided-in-agency-relation standard with an emphasis on the supervisor acting with the employer's "apparent authority," the Restatement (Third) of Agency seems to confirm this. According to the Restatement (Third) of Agency "[a]n agent acts with apparent authority with regard to a third party when the third party reasonably believes that the agent or other actor has authority to act on behalf of the principal and that belief is traceable to manifestations made by the principal." RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006). Although this does not fit perfectly with the harassment context, it is analogous to the idea that, in a hostile work environment, an employee is particularly vulnerable to harassment by a supervisor because the supervisor has the authority to act under the "apparent authority" of the employer, whether or not he or she is exercising that authority in accordance with the employer's wishes. Thus, the employee will feel less free to walk away or shut down the supervisory harassment. *See Faragher*, 524 U.S. at 803.

[72] 133 S. Ct. 2434, 2439 (2013).

for the majority, Justice Alito held that a supervisor is someone who is "empowered by the employer to take tangible employment actions against the [harassment] victim."[73]

The *Vance* majority and many initial commentators accepted *Vance*'s rule as clear and easily administrable. Justice Alito's opinion purported to establish a "clear distinction" between supervisor and coworker,[74] which could be "readily applied" by lower courts and litigants alike.[75] Justice Thomas wrote a concurrence stating that while he continued to disagree with the *Faragher* and *Ellerth* framework, he joined the opinion "because it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."[76] Early commentators also embraced the supposedly clear nature of *Vance*'s rule, with one noting that the Court's "clearly defined concept of who is a supervisor can be readily applied by the courts," and whether someone is a supervisor often "will be known even before litigation."[77] Other commentators noted that "[t]he Court's decision adopted a bright-line practical standard easily applied by employers and employees, as well as courts."[78]

However, the *Vance* dissent[79] and some early commentators[80] cast doubt on how clear and administrable the *Vance* holding was, pointing specifically to Justice Alito's statement that companies may in some cases "effectively delegate[]"[81] supervisory authority to someone without the power to take tangible employment actions. In fact, *Vance*'s holding is much more ambiguous than it appears on its face.[82] The Court left open the question of what level of power makes someone "empowered by the

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[73] *Id.* Justice Alito based this holding on the need for a clear, unitary definition of supervisor and the belief that the essence of supervisory authority is the power to take tangible employment actions. *Id.* at 2448–49.

[74] *Id.* at 2443.

[75] *Id.* at 2449.

[76] *Id.* at 2454 (Thomas, J., concurring).

[77] Flanagan, *supra* note 14, at 2.

[78] Weitzman & Fant, *supra* note 14 at 8.

[79] *Vance*, 133 S. Ct. at 2462 (Ginsburg, J., dissenting) ("There is reason to doubt just how 'clear' and 'workable' the Court's definition is. . . . And when an employer 'concentrates all decisionmaking authority in a few individuals' who rely on information from 'other workers who actually interact with the affected employee,' the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other).").

[80] *See, e.g.*, Hirsch, *supra* note 14, at 173.

[81] For details on Justice Alito's statement, *see supra* note 23 and accompanying text.

[82] As Justice Ginsburg noted in her dissent, "[s]upervisors, like the workplaces they manage, come in all shapes and sizes." *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting). Thus, it is difficult to tell who within a workplace is vested with authority to take tangible employment actions without an in-depth inquiry into the particular workplace. *Id.* at 2462–63.

employer"[83] to take a tangible employment action.[84]

Perhaps acknowledging this concern, Justice Alito noted that in certain circumstances someone may be a supervisor without formally having the authority to take tangible employment actions. According to Justice Alito, if an employer confines formal decisionmaking authority to a small number of people, that small group of decisionmakers will "likely rely on other workers who actually interact with the affected employee" for information and advice regarding the employment action.[85] In that circumstance, "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[86] This "effectively delegated"[87] insight is key to fleshing out the concept of being "empowered by the employer to take tangible employment actions."[88]

Justice Alito's "effectively delegated" language directs the reader to the concept of cat's paw liability. Justice Alito invokes a classic cat's paw situation when he notes that an employer may have delegated supervisory authority to an employee when it relies on that employee's recommendation to make decisions regarding tangible employment actions.[89] Furthermore, in making his "effectively delegated" pronouncement, Justice Alito made two citations, which are useful in clarifying his meaning. First, Justice Alito cited Judge Rovner's concurrence in *Rhodes v. Illinois Department of Transportation*.[90] In *Rhodes*, Judge Rovner suggested rethinking Seventh Circuit precedent, which requires the ability to take tangible employment actions in order for a harasser to be considered a supervisor.[91] Second, Justice Alito cited *Ellerth* for the proposition that an employer in certain circumstances may be held to have delegated supervisory authority.[92] *Ellerth*, in turn, cited

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[83] *Id.* at 2439 (majority opinion).

[84] As the dissent notes, "[w]hether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches." *Id.* at 2463 (Ginsburg, J., dissenting).

[85] *Id.* at 2452 (majority opinion).

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2439.

[89] *Id.* at 2452; *see also* Staub v. Proctor Hosp., 526 U.S. 411, 415–16 (2011) (describing a cat's paw situation in which two biased employees used their influence to cause the ultimate nonbiased decisionmaker to fire the plaintiff).

[90] *Vance*, 133 S. Ct. at 2452 (citing Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 509 (7th Cir. 2004) (Rovner, J., concurring)).

[91] 359 F.3d at 509–10.

[92] *Vance*, 133 S. Ct. at 2452 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998)).

Shager v. Upjohn for this proposition.[93] *Shager* coined the term "cat's paw" liability to refer to the now-common theory in which an employer can be liable if one biased employee, acting with discriminatory intent, causes another nonbiased employee to take a tangible employment action against the plaintiff.[94] Thus, *Vance*'s substance and doctrinal ancestry both indicate that cat's paw liability is incorporated into *Vance*'s definition of supervisor.

D. Cat's Paw Liability

1. Basic Cat's Paw Doctrine.—In cat's paw cases, an employer may be liable when one supervisor, harboring discriminatory intent, causes another supervisor who harbors no discriminatory intent to take a tangible employment action against an employee.[95] In *Staub v. Proctor Hospital*,[96] the Supreme Court clarified the requirements for cat's paw liability. Interpreting the statutory requirement that discrimination must be a "motivating factor" in the adverse action through the lens of "general tort law,"[97] the Court held that "if a supervisor performs an act motivated by . . . animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ."[98] The Court reasoned that all necessary elements for a Title VII violation reside with the biased supervisor: the supervisor has a discriminatory intent and acts on that intent to cause a tangible employment action.[99]

The Court thus incorporated the traditional tort concept of proximate

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[93] *Ellerth*, 524 U.S. at 762.

[94] Shager v. Upjohn, 913 F.2d 398, 405 (7th Cir. 1990) (holding that the employer could be liable for discriminatorily firing an employee because the committee that actually fired the employee acted on the intentionally discriminatory recommendation of a supervisor, thus acting as the supervisor's "cat's paw").

[95] *See* Staub v. Proctor Hosp., 562 U.S. 411, 422–23 (2011).

[96] *Id.* at 424–25. In *Staub*, the Court held that Proctor Hospital could be liable for firing Vincent Staub, a military reservist, due to antimilitary animus even though the supervisor who actually fired Staub, Linda Buck, was not motivated by any antimilitary animus. *Id.* at 422–23. The court held that liability could exist because Ms. Buck's decision to fire Mr. Staub was causally based on the opinions of other biased supervisors. *Id.* Those other biased supervisors' antimilitary animus caused Mr. Staub's termination even if they did not actually fire him. *Id.* Although *Staub* arose out of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which makes employment actions motivated by antimilitary bias unlawful, the Court recognized that the USERRA and Title VII's operative language makes the two statutes "very similar," and cited Title VII cases in its analysis of USERRA. *Id.* at 417.

[97] *Id.* at 417.

[98] *Id.* at 422 (footnote omitted).

[99] *Id.* at 419 ("Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct.").

causation into the Title VII context.[100] It defined proximate cause as "some direct relation between the injury asserted and the injurious conduct alleged . . . exclud[ing] only those link[s] that are too remote, purely contingent, or indirect."[101] The use of proximate causation has not gone without criticism—one commentator noted that "[t]he notoriously flexible and inconsistent theoretical underpinnings of proximate cause make it likely that courts purporting to import proximate cause will actually be making relatively unguided policy decisions."[102]

Crucially, *Staub* limits the scope of cat's paw liability in a way that makes it less likely for the employer to be found liable for a coworker's biased actions than for a supervisor's. *Staub* did not explicitly address whether, on the principles it adopted, a coworker could create cat's paw liability for an employer.[103] However, according to *Staub*, biased nondecisionmakers must be acting within the scope of their employment or in such a way that "liability would be imputed to the employer under traditional agency principles."[104] This limitation makes a coworker cat's paw situation rare. It is much more likely that a supervisor would be acting within the scope of her employment in influencing the ultimate decisionmaker than it would be for a coworker to do the same.[105]

The Court rejected the defendant's contention that an intervening independent investigation into the grounds for the tangible employment action would necessarily shield an employer from liability by severing the causal connection between the impermissible bias and the tangible employment action.[106] The Court noted that, under tort law, the exercise of judgment by a later decisionmaker does not prevent an earlier decisionmaker's action from being the proximate cause of the resulting harm unless the ultimate decisionmaker's action was a "cause [of the employment action] of independent origin that was not foreseeable."[107] Thus, a decisionmaker's independent investigation into the grounds for firing an employee will not necessarily exempt an employer from liability if the earlier action by the biased supervisor remains a factor in the adverse

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[100] *Id.* at 420.

[101] *Id.* at 419 (second alteration in original) (internal quotation marks omitted).

[102] Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013) ("Proximate cause has no independent descriptive power and is highly dependent on the underlying tort to which it is attached.").

[103] 562 U.S. at 422 n.4.

[104] *Id.*

[105] *See* Abdelhadi v. City of New York, No. 08-CV-380, 2011 WL 3422832, at *5 (E.D.N.Y. Aug. 4, 2011) *aff'd sub nom.* Abdelhadi v. N.Y.C. Dep't of Corr., 472 F. App'x 44 (2d Cir. 2012).

[106] *Staub*, 562 U.S. at 421.

[107] *Id.* at 420 (quoting Exxon Co. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

employment action.[108]

Justice Alito, the author of the majority opinion in *Vance*, concurred in *Staub*, arguing for narrower cat's paw liability than the majority. Justice Alito stated that there is liability only where the supervisor with formal decisionmaking authority has sufficiently delegated authority to the supervisor with discriminatory intent such that the formal decisionmaker merely "rubberstamps" the decision.[109] According to Justice Alito, in order to satisfy the statutory requirement that discrimination be a "motivating factor" for the action, the discriminatory intent must be "in the mind" of the decisionmaker and cannot come indirectly from another source.[110] In his concurrence in *Staub*, Justice Alito used language very similar to his discussion in the *Vance* plurality regarding employer liability despite the employer cabining supervisory authority to just a few decisionmakers. In both, Justice Alito stressed that an employer has "delegated" the authority for the tangible employment action to an employee who is not formally empowered to take tangible employment action.[111]

2. Cat's Paw Policy Considerations.—Commentators have noted that in establishing this proximate causation standard and sanctioning cat's paw liability, the Court adapted Title VII to trends in how companies structure their personnel decisions. Direct employer liability (as distinct from cat's paw liability) encourages employers to adopt diffuse structures in making personnel decisions as a check on decisionmaker bias.[112] In line with this, the use of human resources departments as the formal decisionmaker in personnel decisions has boomed.[113] Cat's paw liability responds to this trend by ensuring that employers cannot escape liability if impermissible motives still play a role in such a diffuse decisionmaking process. Cat's paw liability thus encourages employers to conduct independent investigations before the formal decisionmaker takes action to

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[108] *Id.* at 421.

[109] *Id.* at 424–25 (Alito, J., concurring).

[110] *Id.*

[111] *Compare id.* at 425 ("Where the officer with formal decisionmaking authority merely rubberstamps the recommendation of others, the employer, I would hold, has actually delegated the decisionmaking responsibility to those whose recommendation is rubberstamped."), *with* Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013) ("[T]he employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.").

[112] *See* Timothy P. Powderly, Note, *Limiting the Ways to Skin a Cat—An End to the Twenty Year Perplexity of the Cat's Paw Theory in* Staub v. Proctor*?*, 31 ST. LOUIS U. PUB. L. REV. 617, 635 (2012).

[113] Benjamin Pepper, Note, Staub v. Proctor Hospital*: A Tenuous Step in the Right Direction*, 16 LEWIS & CLARK L. REV. 363, 373 (2012).

interrupt the causal relationship between a possibly biased input and the formal decision.[114]

II. DEFINING "SUPERVISOR" THROUGH CAT'S PAW LIABILITY

This Note argues that a proper reading of *Vance* is that a harasser is a supervisor if, acting within the scope of her employment or in a way that would make the employer liable under other agency principles, the harasser can proximately cause the employer to take a tangible employment action against the harassed employee. In *Vance*, Justice Alito wrote that where an employer confines formal decisionmaking power to only a few individuals, the employers will have "effectively delegated" supervisory authority to the employees who will inevitably influence the formal decisionmaker's actions.[115] This statement complicates the seemingly clear definition of supervisor that Justice Alito established in *Vance*.[116] Justice Alito's "effectively delegated" language doctrinally and substantively incorporates cat's paw liability into *Vance*'s definition of supervisor. This language should inform how lower courts understand what it means to be "empowered by the employer to take tangible employment actions."[117]

This Part will first establish the doctrinal connection between *Vance*'s definition of supervisor and cat's paw liability. Then, this Part will explore how cat's paw liability, as described in *Staub*, fits into the definition of supervisor in the hostile work environment context. Finally, this Part will explore how reading cat's paw liability into the definition of supervisor set out in *Vance* is normatively desirable, and how courts can apply the cat's paw supervisor standard.

A. The Doctrinal Connection Between Vance *and Cat's Paw Liability*

Three points of connection demonstrate that cat's paw liability is incorporated into *Vance*'s definition of supervisor: two citations Justice Alito makes in *Vance*, substantive similarities between the two concepts, and the implications of agency principles. First, Justice Alito indicated that *Vance*'s definition of supervisor is more nuanced than a bright-line rule by

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[114] *See* Keaton Wong, Note, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1750–51, 1754 (2008) (arguing that a weak cat's paw causation requirement disincentivizes independent investigation because independent investigation would not stop liability, and too strong a causation standard disincentivizes investigation because there would not be liability even without an independent investigation).

[115] *Vance*, 133 S. Ct. 2434, 2452 (2013).

[116] *Id.* at 2439 ("We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . .").

[117] *Id.*

citing a concurrence in a Seventh Circuit case criticizing the exact bright-line rule that *Vance* supposedly adopted. Citing to *Rhodes v. Illinois Department of Transportation*, Justice Alito wrote that "[i]f an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals . . . will likely rely on other workers who actually interact with the affected employee."[118] In *Rhodes*, Judge Rovner encouraged the Seventh Circuit to rethink the very bright-line rule that, according to some, the Supreme Court adopted in *Vance*: that an employee is only a supervisor if given formal authority to take tangible employment actions.[119] Judge Rovner noted that the Seventh Circuit's bright-line rule does not "comport with the realities of the workplace."[120] In *Rhodes*, the plaintiff worked at a maintenance yard remote from the central control of the Illinois Department of Transportation.[121] The plaintiff's alleged harassers were the lead employees at the yard: they were responsible for the plaintiff's day-to-day work assignments, but they did not have the authority to take a tangible employment action against the plaintiff.[122] Although acknowledging that under Seventh Circuit precedent the alleged harassers were not supervisors, Judge Rovner encouraged the Seventh Circuit to rethink its hardline stance, noting that it excludes employees who "enjoy substantial authority over the plaintiff's day-to-day work life" from the category of supervisors.[123] Justice Alito's citation to *Rhodes* demonstrates that his definition of supervisor in *Vance* is much more nuanced than his clear-cut statement regarding power to take tangible employment actions would indicate.

Another citation makes the direct link between *Vance*'s nuanced concept of supervisory authority and cat's paw liability.[124] In support of his statement that in certain instances an employer may have "effectively delegated" supervisory authority without formally bestowing it,[125] Justice Alito cited *Ellerth*'s statement that a tangible employment action is an official act of the employer and "may be subject to review by higher level

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[118] *Id.* at 2452 (citing Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 509 (7th Cir. 2004) (Rovner, J., concurring)).

[119] *Rhodes*, 359 F.3d at 510.

[120] *Id.*

[121] *Id.* at 501 (majority opinion).

[122] *Id.* at 501–02.

[123] *Id.* at 510 (Rovner, J., concurring).

[124] Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013).

[125] *Id.* (stating that in a case where an employer has cabined formal authority to take tangible employment actions to just a few people, "the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies").

supervisors."[126] *Ellerth*, in turn, cited to *Shager v. Upjohn*.[127] In *Shager*, "the [biased] supervisor did not fire plaintiff; rather, [a committee] did, but the employer was still liable because the committee functioned as the supervisor's 'cat's-paw.'"[128] *Shager*, furthermore, is the case that introduced the term cat's paw liability to employment law.[129] *Vance*'s doctrinal ancestry thus demonstrates that a cat's paw theory is incorporated into *Vance*'s definition of supervisor.

Second, *Vance*'s acknowledgement that supervisory authority may be found in a case in which an employer "rel[ies] on other workers who actually interact with the affected employee"[130] is precisely a cat's paw situation—the formal decisionmaker acts as the cat's paw for the employee on whose input the decisionmaker relies.[131] Using *Staub*'s terms, the employee giving the input has proximately caused the tangible employment action.[132] *Vance*, thus, incorporates the concept of being able to proximately cause a tangible employment action into its definition of supervisor.

The similarity in language between Justice Alito's *Vance* opinion and *Staub* concurrence supports this substantive connection. In *Vance*, Justice Alito wrote about an employer having "effectively delegated" supervisory authority to an employee who is not formally empowered to take tangible employment actions when the formal decisionmaker relies on that employee's recommendations.[133] In *Staub*, Justice Alito wrote that an employer is "actually delegating" decisionmaking authority to an employee whose recommendation is rubberstamped by the formal decisionmaker.[134] Although the modifier attached to "delegating" is different, the substantive concept of delegation in each is very similar. Justice Alito's language in *Vance* is similar enough to his *Staub* concurrence that it is reasonable to think that he is referring to the same concept in both: cat's paw liability.

Finally, incorporating cat's paw liability into the definition of supervisor is also consistent with the agency principles that underlie the *Faragher* and *Ellerth* framework. *Faragher* and *Ellerth* posit that

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[126] *Id.* at 2442 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990))).

[127] *Ellerth*, 524 U.S. at 762 (citing *Shager*, 913 F.2d at 405).

[128] *Id.*

[129] Staub v. Proctor Hosp., 526 U.S. 411, 415 n.1 (2011).

[130] 133 S. Ct. 2434, 2452 (2013).

[131] Indeed, this fact pattern succinctly describes the facts of *Staub* itself. *See* 526 U.S. at 413–16 (describing a situation in which two workers, acting based on impermissible bias, influenced the nonbiased formal decisionmaker to fire Staub).

[132] *See id.* at 422.

[133] 133 S. Ct. at 2452.

[134] 526 U.S. at 424–25 (Alito, J., concurring).

employers are liable for supervisory harassment when the harassment is "aided in accomplishing the tort by the existence of the agency relation[ship]."[135] Supervisory authority "invests [a supervisor's] harassing conduct with a particular threatening character."[136] Thus, the supervisor's agency relation to the victim aids supervisory harassment, and the employer should be liable. A supervisor's harassment is especially threatening because of the supervisor's ability to take tangible employment actions against a victim.[137] Given this reasoning, it does not make sense to differentiate between formal decisionmakers and persons who can proximately cause tangible employment actions. A person who has the power, for example, to recommend someone's termination is aided in harassment by his agency relation to the harassment victim even if he could not sign the paperwork formally terminating the harassed employee.

Additionally, the Restatement (Third) of Agency has eliminated the aided-by-agency-relation standard in favor of expanding the apparent authority theory of agency liability.[138] This change also supports reading cat's paw liability into the definition of supervisor. Under the Restatement, apparent authority exists when "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[139] In this situation, the harassment victim would be the "third party," and the harasser would be the "actor." An employee who can proximately cause a tangible employment action against the victim by, for example, making a recommendation or giving a poor performance review, is certainly "clothed with the employer's authority," even if they do not have formal decisionmaking powers.[140] Furthermore, in many cases, this apparent authority will be caused by the employer's

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[135] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998) (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)); Faragher v. City of Boca Raton, 524 U.S. 775, 801 (1998) (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)). Although *Ellerth* and *Faragher* significantly depart from the aided-by-agency-relation standard, they use this standard as a "starting point" for their theory. *Faragher*, 524 U.S. at 802.

[136] *Ellerth*, 524 U.S. at 763 (also noting, however, that "there may be some circumstances where the supervisor's status makes little difference"); *see also Faragher*, 524 U.S. at 803 ("When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . . .").

[137] *Faragher*, 524 U.S. at 803.

[138] *Vance*, 133 S. Ct. at 2441 n.2; RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006) ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability. The purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents.").

[139] RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).

[140] *Ellerth*, 524 U.S. at 763 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 77 (1986)).

actions—referred to as the "principal's manifestations" in the Restatement—such as putting the harasser in a more senior position than the harassed employee.[141] Thus, under an apparent authority theory, there is no reason to differentiate between employees with formal authority to take tangible employment actions and those who can proximately cause tangible employment actions. Agency principles, on which employer vicarious liability under Title VII is based,[142] support reading cat's paw liability into the definition of supervisor in *Vance*.

B. The Contours of the Cat's Paw Supervisor

In *Staub*, the Supreme Court defined the theory of cat's paw liability, which Justice Alito incorporated into his definition of supervisor in *Vance*. *Staub* defines cat's paw liability as a situation in which an employee proximately causes an adverse employment action to be taken against a plaintiff, where the employee who proximately causes the employment action (1) is motivated by impermissible bias, (2) intends to bring about the adverse employment action, and (3) is acting within the scope of her employment or in a way in which liability would be imputed to the employer under traditional agency principles.[143] By making cat's paw theory implicit in its definition of supervisor, *Vance* provides that someone is "empowered by the employer to take tangible employment actions against the victim"[144] and thus a supervisor when that person, acting within the scope of her employment or in another way that could make the employer liable, has the power to proximately cause a tangible employment action to be taken against the victim. While this definition includes formal decisionmakers as supervisors, the formal authority to take tangible employment actions against the victim is not dispositive to supervisory status.

Although in his concurrence Justice Alito understood cat's paw liability to be much narrower than the *Staub* majority did, lower courts should use the *Staub* majority's version of cat's paw liability in defining supervisor. Justice Alito laid the textual and doctrinal groundwork for incorporating cat's paw liability into the definition of supervisor, but the *Staub* majority provides mandatory precedent defining the concept of cat's paw liability. On statutory grounds, the majority rejected Justice Alito's

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[141] RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006); *see, e.g.*, Mack v. Otis Elevator Co., 326 F.3d 116, 120 (2d Cir. 2003) (in which an elevator mechanic was harassed by the "mechanic in charge," a position given to a senior mechanic whenever there were five or more mechanics on a single job).

[142] *Vance*, 133 S. Ct. at 2441 (citing *Ellerth*, 524 U.S. at 760–63; *Meritor*, 477 U.S. at 72).

[143] Staub v. Proctor Hosp., 526 U.S. 411, 422 & n.4 (2011).

[144] 133 S. Ct. at 2439.

view that "the employer should be held liable only when it 'should be regarded as having delegated part of the decisionmaking power' to the biased supervisor."[145] Justice Alito's restriction is unnecessary because "[a]nimus and responsibility for the adverse action can both be attributed to the earlier [biased] agent" under the proximate causation standard even without the employer having effectively delegated decisionmaking authority to the biased agent.[146] A more restrictive view would create a situation where any independent investigation by the formal decisionmaker would prevent employer liability despite animus being the proximate cause of a tangible employment action. This would be an "implausible meaning of the text" of Title VII.[147] In the context of the definition of supervisor, a narrower reading of cat's paw liability—one that excludes a proximate cause standard—would frustrate the purpose of *Vance*'s "effectively delegated" language: flexibility in the face of shifting or poorly defined workplace hierarchies.

For this reason, the *Staub* majority held that a biased agent who proximately causes the tangible employment action "possessed supervisory authority delegated by their employer and exercised it in the interest of their employer."[148] It makes sense that, for example, a senior employee who the employer relies on for recommendations concerning tangible employment actions should be considered to have supervisory authority due to her role in making employment decisions.[149] It would thus contravene established Supreme Court precedent to restrict supervisory authority through a cat's paw theory to a narrow set of situations in which an employer has effectively delegated supervisory authority to a nonformal decisionmaker. A person who can proximately cause an adverse employment action has supervisory authority.

1. Adapting Cat's Paw to the Harassment Context.—The cat's paw definition of supervisor does not require that the supervisor have an impermissibly motivated intent to cause a tangible employment action to be taken against the victim of the harassment. In the hostile work environment context, intent to cause a tangible employment action is unnecessary. In contrast to other Title VII claims, a hostile work environment claim does not require any tangible employment action—the statutorily prohibited

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[145] *Staub*, 526 U.S. at 421 (quoting Alito, J., dissenting).

[146] *Id.* at 419.

[147] *Id.* at 420.

[148] *Id.*

[149] *See, e.g.*, Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., concurring).

change in "terms, conditions, or privileges of employment" motivated by impermissible bias[150] is created by "severe or pervasive" harassment rather than a tangible employment action.[151] Thus, it would not make sense to require specific intent to cause a tangible employment action for someone to qualify as a supervisor for purposes of a hostile work environment claim. A person is a supervisor if she fulfills the rest of the *Staub* requirements: that the harasser, acting within the scope of her employment or in a way that would make her liable under other agency principles, can proximately cause the employer to take a tangible employment action against the harassed employee.[152]

2. Within Scope of Employment or Imputable to the Employer Through Other Agency Principles.—Importing cat's paw liability's agency-based limitations into *Vance*'s definition of supervisor limits the category of supervisor to persons who have at least some authority over the harassed victim. In accordance with *Staub*, a supervisor must be able to proximately cause a tangible employment action when acting "within the scope of his employment, or when . . . liability would be imputed to the employer under traditional agency principles."[153] *Faragher* and *Ellerth* establish that the main agency principle applicable to employer liability in the harassment context is the aided-by-agency-relation standard.[154] Two agency principles in the disjunctive thus form the outer bounds of the cat's paw supervisor[155]: "acting in the scope of . . . employment"[156] or being "aided in accomplishing the tort by the existence of the agency relation."[157] The Restatement (Third) of Agency eliminates the aided-by-agency-relation standard in favor of an expanded apparent authority standard, which is thus another possibility for employer liability under this theory.[158]

All three of these theories are based in some way on a supervisor's

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[150] 42 U.S.C. § 2000e-2 (2012).

[151] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[152] 526 U.S. at 422 & n.4.

[153] *Id.* at 422 n.4.

[154] *See supra* Part I.B.1.

[155] *Staub* cites to *Ellerth* for the proposition that cat's paw liability is limited by agency principles of liability. *Staub*, 526 U.S. at 422 n.4. *Ellerth*, in turn, looks to the Restatement (Second) of Agency to explain the two possibilities noted above for employers being liable for harassment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755–56 (1998) (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

[156] *Ellerth*, 524 U.S. at 756.

[157] *Id.* at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

[158] RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006).

formal or informal "special dominance" over an employee.[159] Most obviously, a supervisor acting within the scope of his employment is exercising his formal authority as supervisor.[160] Formal authority includes the authority to hire, fire, or take another tangible employment action against the employee.[161]

Someone may also be a supervisor because she is aided by her agency relation in her ability to proximately cause the employer to take a tangible employment action against the harassed victim.[162] This could arise in a situation similar to *Rhodes*, in which, for example, the harasser is the victim's day-to-day supervisor.[163] In this type of situation, the harasser's ability to proximately cause a tangible employment action against the victim exists because of the structure of the agency relationship.

Finally, courts should recognize that a person is a supervisor if she can cause a tangible employment action while acting with the apparent authority of the employer.[164] Apparent authority requires a reasonable belief on the part of the harassment victim that the harasser has the authority to take tangible employment actions against them, and that belief must be traceable to a manifestation on the part of the employer.[165] An example of this situation would be where an employee who has been designated by the employer as a lead employee harasses a junior employee, and the junior employee reasonably believes that the lead employee can proximately cause his termination despite the lead employee lacking that formal authority.[166]

All of these scenarios fit with the insight that an employee is particularly vulnerable to harassment by a supervisor. In *Faragher*, the Supreme Court noted that "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to

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[159] Mack v. Otis Elevator Co., 326 F.3d 116, 125–26 (2d Cir. 2003); *see supra* Part I.B.3 (discussing employee vulnerability to supervisor authority).

[160] *See Ellerth*, 524 U.S. at 762.

[161] *See supra* notes 34–36 and accompanying text (discussing the definition of tangible employment action).

[162] *Ellerth*, 524 U.S. at 758.

[163] Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 501–02 (7th Cir. 2004) (in which the plaintiff worked in maintenance yard remote from the central control of the Illinois Department of Transportation and was harassed by the lead employees in the yard, who did not have formal authority to take tangible employment actions against the victim).

[164] *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006).

[165] *Id.* § 7.08 cmt. b.

[166] *See, e.g.*, Mack v. Otis Elevator Co., 326 F.3d 116, 120 (2d Cir. 2003) (in which an elevator mechanic was harassed by the "mechanic in charge," a position given to a senior mechanic whenever there were five or more mechanics on a single job).

offer such responses to a supervisor . . . ."[167] This is also consistent with circuit court holdings that, prior to *Vance*, emphasized supervisors' "special dominance" over employees rather than the formal power to hire and fire when determining employer liability in a hostile work environment context.[168]

These agency limits on the cat's paw supervisor also prevent employees who are truly coworkers from being considered supervisors. A true coworker cannot proximately cause the employer to take a tangible employment action while acting in the scope of his employment, while aided by his agency relation, or by using the employer's apparent authority.[169] If someone can proximately cause a tangible employment action to be taken against another employee while acting in these ways, it stretches the plain meaning of the term to call him just a coworker.

C. Policy Implications

Defining supervisor through the ability to proximately cause a tangible employment action is desirable for several reasons. First, this theory creates law that is flexible enough to address the myriad workplace structures that exist in the modern world. Second, this definition is well suited to a hostile work environment claim, which by definition does not require a tangible employment action and instead requires frequent and severe harassment. Third, this theory is administrable by the courts, which are used to inquiring into hypothetical workplace power dynamics in the common law tests for who is an employee.

The increasingly nonhierarchical and team-based nature of the workplace requires hostile work environment rules that are adaptable to new corporate structures. In the past several decades, companies have been flattening their structures, increasing the use of teams, and implementing evaluation systems that involve not just bosses but also one's coworkers and subordinates.[170] Since the 1980s, large U.S. businesses have decreased the number of employees between the lowest level worker and CEO and

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[167] Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (elaborating that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior."); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998) (noting that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character . . . .").

[168] *Mack*, 326 F.3d at 125–26; *see supra* Part I.B.3 (discussing employee vulnerability to supervisor authority).

[169] *See supra* Part II.B.2 (discussing the agency restrictions on cat's paw liability).

[170] Green, *supra* note 15, at 640–41 (noting that these changes mean that social interactions and thus work culture take increasing importance in the workplace). Professor Green argues that existing hostile work environment doctrine fails to address the discriminatory effect of work culture because, among other reasons, it "tend[s] to focus on targeted, exclusionary conduct by particular, identifiable harassers." *Id.* at 657.

increased the number of workers who directly report to the CEO.[171] There has also been an increase in the use of specialized decisionmakers with firm-wide authority, such as human resources managers.[172] This dynamic leads to more decisions being made in a formally centralized manner and also leads to more input into those decisions from various different parts of the organization.[173]

At the same time, self-managing work teams are becoming more prevalent.[174] Self-managing work teams, as their name suggests, are groups of workers who have the power to direct their own work through some internal process without outside management approval.[175] Anywhere from 69% to 82% of U.S. firms use self-managing work teams in some capacity.[176] Self-managing work teams often operate by consensus, and decisions may include all aspects of personnel decisions as well as production decisions.[177] Employee evaluation has followed this same trend, with employees increasingly being evaluated on their job performance by their peers and even subordinates.[178] The increased focus on teamwork and corporate culture has involved more and more employees in each new hiring decision because the new hire must "fit" with the rest of the team.[179]

Defining supervisor through power to proximately cause a tangible employment action helps adapt Title VII rules to a decentralized workplace decisionmaking model, an area in which traditional Title VII rules can break down.[180] Decentralization of workplace authority requires flexible

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[171] *Flattening Firm*, *supra* note 16, at 760; *Not as Advertised*, *supra* note 16, at 10.

[172] *Not as Advertised*, *supra* note 16, at 12.

[173] *Not as Advertised*, *supra* note 16, at 11 ("Since CEOs are time-constrained, they have less time to allocate to each subordinate when they have more direct reports. It follows that subordinates are making more decisions, and that CEOs are more hands-off as they push decisions down—a form of decentralization. On the other hand, a broader span means that the CEO has more direct connections deeper in the organization, and is potentially more involved in decision making across more organizational units. Thus division managers' decision making is subject to more direct oversight by a hands-on CEO who exercises more control and pushes decisions up—a form of centralization.").

[174] Yang & Guy, *supra* note 18, at 60.

[175] *Id.* at 61.

[176] *Id.* at 60.

[177] Andrew Polland, Note, *The Emergence of Self-Directed Work Teams and Their Effect on Title VII Law*, 148 U. PA. L. REV. 931, 934 (2000). Polland argues that traditional Title VII law, which emphasizes the presence of discriminatory intent in taking a tangible employment action, is ineffective in the context of group decisionmaking in which any decision will necessarily have several intents behind it. *Id.* at 959.

[178] *See* Luthans & Peterson, *supra* note 19, at 243–44 (noting that companies such as Intel, Boeing, Xerox, FedEx, and Dupont all use 360-degree evaluation systems in which managers get feedback from peers and subordinates).

[179] Green, *supra* note 15, at 638 (footnote omitted).

[180] Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 791 (2010) (noting how courts frequently oversimplify complex corporate decisionmaking in

rules. In a workplace in which teams, multisource evaluations, and flattened hierarchies shape personnel decisionmaking, bright-line rules are unlikely to be effective in capturing workplace power dynamics that make supervisory harassment especially problematic. These bright-line rules will inevitably be "underinclusive, overinclusive, or both."[181] For example, even if a human resources manager were the only person in a company with the formal authority to take tangible employment actions against employees, it would be underinclusive to label the human resources manager as the only supervisor in the company. A bright-line rule will inadequately account for the variety and fluidity of modern workplace structures.[182] The supervisor through proximate causation standard solves these problems, because by its nature it is flexible and applicable to any workplace. Although proximate causation has been criticized as indeterminate and policy driven,[183] this is an advantage in the context of the modern workplace.

Furthermore, cutting day-to-day supervisors who do not have formal hiring and firing power out of the category of supervisor runs counter to two of the major features of the hostile work environment cause of action. The hostile work environment cause of action, as its distinguishing feature, does not require a tangible employment action against the employee.[184] Instead, the hostile work environment cause of action relies on "severe or pervasive" harassment.[185] Commentators have noted that courts frequently require repeated, pervasive misconduct in order to establish a hostile work environment cause of action.[186] As a practical matter, it is less likely that

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the Title VII context).

[181] Sturm, *supra* note 15, at 461. Professor Sturm argues that we have moved past first generation workplace discrimination, characterized by overt policies of exclusion and subordination and that modern workplace discrimination challenges are instead characterized by "subtle, interactive, and structural bias," such as a case in which male coworkers without the power to hire or fire a woman colleague nevertheless freeze her out of the workplace's social interactions, thereby marginalizing her. *Id.* at 468–74. Professor Strum argues that a rule-based approach will be ineffective at curbing second-generation discrimination. *Id.* at 470–74.

[182] *Id.* at 475–76; Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 645 (1998) (arguing that these new workplace dynamics "require[] embracing the challenge of developing new forms of legal regulation that treat organizational decision makers and incentive structures explicitly as part of the legal regulatory regime").

[183] *See* Sperino, *supra* note 102, at 3 ("Proximate cause has no independent descriptive power and is highly dependent on the underlying tort to which it is attached."). This is a virtue in the context of a fluid workplace hierarchy, though—it frees courts from focusing on arbitrary rules and allows them to focus on the power dynamic that makes supervisory harassment such a concern.

[184] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

[185] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993) (establishing the "frequency of the discriminatory conduct" as relevant to the hostile work environment cause of action).

[186] Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL'Y 247, 258 (2008); Heather L. Kleinschmidt, *Reconsidering Severe or*

pervasive harassment will come from a distant supervisor who has the authority to hire or fire rather than from a day-to-day supervisor who has daily access to the victim. Indeed, the pervasiveness prong of the hostile work environment standard protects workers from exactly this kind of persistent, day-to-day harassment. Although the Supreme Court has made it clear that there must be some difference in employer liability between supervisory and coworker harassment,[187] it does not make sense to draw this line at the formal power to take tangible employment actions given the content of the hostile work environment cause of action. The cat's paw supervisor standard preserves the distinction between supervisor and coworker[188] while also allowing for recovery for pervasive harassment by day-to-day supervisors who may not have the formal power to hire and fire but are nonetheless hard for victims to rebuff because of their power within the office hierarchy. The cat's paw supervisor standard thus gets to the heart of the policy concern that supervisory harassment is especially insidious due to the unequal power dynamic between supervisor and employee.[189]

D. Administrability

The cat's paw supervisor theory is administrable. Courts frequently are asked to inquire into hypothetical workplace power dynamics. For example, courts inquire into employer control of workers to determine if a worker is an independent contractor or an employee for the purposes of employee protection laws.[190] A similar control test is used to determine whether a person is an employee or independent contractor for the purpose of establishing the ownership of copyrighted work.[191] These tests focus on hypothetical power dynamics in the workplace—the degree of control the employer exercises over the putative employee.[192] Courts have developed

Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action, 80 IND. L.J. 1119, 1129 (2005); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 323–24.

[187] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998).

[188] *See supra* Part II.B.2.

[189] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) ("When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . . .").

[190] *See, e.g.*, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 525–26 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015) (looking to two different factor tests to determine Fox Searchlight's level of control over production interns to decide if the unpaid interns were employees protected by federal and state labor laws).

[191] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.").

[192] *Id.* at 751–52.

factor tests to aid in determining the hypothetical workplace dynamic.[193] Courts inquiring into workplace power dynamics in the cat's paw supervisor context should develop a factor test to aid administrability.

A possible cat's paw supervisor factor test could focus on many factors drawn from harassment and cat's paw cases and policy considerations. Factors could include the harasser's formal power to take tangible employment actions against the plaintiff,[194] the harasser's responsibility for evaluating the plaintiff's work and how consequential those evaluations are,[195] the harasser's responsibility for day-to-day supervision of the plaintiff,[196] the harasser's position in the corporate structure relative to the plaintiff and the person formally charged with making tangible employment decisions,[197] the employer's practice of conducting independent inquiries into the plaintiff's job performance,[198] and whether the formal decisionmaker is at the same job site as the plaintiff.[199] A court applying *Vance*'s empowered-to-take-tangible-employment-action standard should mine the case law to determine what factors courts have used to determine supervisory power and integrate those factors into its factor test. A factor test, while not as bright a line as *Vance*'s early commentators desired, provides a structure that employers and lower courts can use to predict whether an employee will be deemed to be a supervisor.

CONCLUSION

Vance established that, for Title VII hostile work environment purposes, a supervisor is an employee who is "empowered by the employer

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[193] *See id.*; *Glatt*, 293 F.R.D. at 525–26.

[194] This is the simplest reading of *Vance*'s "empowered by the employer to take tangible employment actions" rule. Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013). Certainly, an employee who has the formal power to "bring[] the official power of the enterprise to bear on subordinates" is a supervisor. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

[195] *See* Staub v. Proctor Hosp., 526 U.S. 411, 420 (2011) ("An employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors.").

[196] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 781, 808 (1998) (referring to David Silverman, who was responsible for the plaintiff's daily work assignments and supervision but who did not have the authority to hire and fire, as a "supervisor").

[197] *See id.* at 781 (describing how the plaintiff, a lifeguard, reported directly to her harassers, a lifeguard lieutenant and the Chief of Marine Safety, who in turn reported to managers at the parks department, who were responsible for approving all hiring and firing decisions).

[198] *See Staub*, 526 U.S. at 421–22 (holding that the existence of an independent investigation is relevant to deciding if a biased employee's actions were the proximate cause of a tangible employment action but declining to adopt a bright-line rule regarding independent investigations).

[199] *See* Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 501–03 (7th Cir. 2004) (describing a situation in which the harassers were the lead employees at a job site remote from any formal decisionmakers).

to take tangible employment actions against the victim."[200] This definition seems clear but demands that courts define what constitutes being "empowered by the employer" to take such actions. Courts should read *Vance* as holding that a harasser is "empowered by the employer to take tangible employment actions"[201] and is thus a supervisor if the harasser can proximately cause the employer to take a tangible employment action against his victim while acting within the scope of his employment, while aided by the agency relationship, or while acting with the employer's apparent authority. This definition is well suited to the hostile work environment cause of action, which does not require any tangible employment action to be taken against the plaintiff and instead requires frequent and severe harassment of the plaintiff. Furthermore, this rule is flexible enough to be applied to myriad workplaces and yet still concrete enough for courts to apply during litigation.

[200] 133 S. Ct. 2434, 2439 (2013).

[201] *Id.*